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Supreme Court, U.S.
FILED
JAN 16 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. 86-6013

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

[redacted]

PETITIONER,

[redacted]

RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE ALABAMA SUPREME COURT

[redacted]'S BRIEF IN OPPOSITION
TO CERTIORARI

CHARLES A. GRADDICK
ALABAMA ATTORNEY GENERAL

WILLIAM D. LITTLE
ASSISTANT ALABAMA ATTORNEY GENERAL

MARTHA GAIL INGRAM
ASSISTANT ALABAMA ATTORNEY GENERAL

Alabama State House
11 South Union Street
Montgomery, AL 36130
(205) 261-7300

NO. 86-6015

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

DANNY JOE BRADLEY,

PETITIONER

VS.

STATE OF ALABAMA,

RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI

TO THE ALABAMA SUPREME COURT

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QUESTIONS PRESENTED FOR REVIEW

1(a). Should certiorari be granted to review tne lower court's application of Brady v. Maryland, 373 U.S. 83 (1963), to the specific circumstances of this one fact-bound case?

1(b). Should this Court's limited certiorari powers be granted to review a state court's factual determination as to whether or not a pre-trial discovery order was complied with by the Prosecutor?

2(a). Should certiorari be granted to review the lower court's application of Doyle v. Ohio, 426 U.S. 610 (1976), to the specific circumstances of this one fact-bound case?

2(b). Should certiorari be granted to review the lower court's application of Anderson v. Charles, 447 U.S. 404 (1980), to the specific circumstances of this one fact-bound case?

2(c). Should this Court's limited certiorari powers be granted to review a state court's factual determination as to whether a Prosecutor properly questioned a defendant as to a prior inconsistent statement?

3(a). Should certiorari be granted to review the lower court's application of Taylor v. Alabama, 457 U.S. 687, 690 (1982), to the specific circumstances of this one fact-bound case?

3(b). Should certiorari be granted to review a state court's factual determination as to the voluntariness of a consent to search given by a defendant?

4(a). Should certiorari be granted to review the lower court's application of United States v. Uptain, 531 F.2d 1281 (5th Cir. 1976), to the specific circumstances of this one fact-bound case?

4(b). Should certiorari be granted to review a state court's factual determination as to whether a trial court abused its discretion in asking questions of the defendant?

5. Should this Court's limited certiorari powers be used to review issues which only involve factual determinations by the state court when these issues will be reviewed in a 28 U.S.C. § 2254 proceeding?

6(a). Should this Court grant certiorari as to the issue of whether an overlap between the aggravated aspect of the capital offense and an aggravating circumstance for purpose of sentence determination violates the Eighth Amendment where the issue is clearly without merit?

6(b). Should this Court grant certiorari as to the issue of whether the facts supported the finding that the capital offense was especially heinous, atrocious, or cruel compared to other capital offenses where the issue is clearly without merit?

6(c). Should this Court grant certiorari as to the issue of whether the facts supported the finding that the capital offense was especially heinous, atrocious, or cruel compared to other capital offenses where the issue involves a relitigation of questions of fact already decided below?

PARTIES

The caption contains the names of all parties in the Court below.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED FOR REVIEW----------	i
PARTIES----------	ii
TABLE OF CONTENTS----------	iii
TABLE OF AUTHORITIES----------	v
STATUTES----------	vi
OPINIONS BELOW----------	1
JURISDICTION----------	1
CONSTITUTIONAL PROVISIONS INVOLVED----------	1
STATUTORY PROVISIONS INVOLVED----------	1
STATEMENT OF THE CASE----------	2
ARGUMENT----------	7
I. THE COURT BELOW CORRECTLY HELD THAT THERE WAS NO VIOLATION UNDER BRADY V. MARYLAND, 373 U.S. 83 (1963).----------	8
II.(a) THE COURT BELOW CORRECTLY HELD THAT THERE WAS NO VIOLATION OF DOYLE V. OHIO, 426 U.S. 610 (1976) BY THE PROSECUTOR. ----------	8
II.(b) THE COURT BELOW CORRECTLY HELD THAT PURSUANT TO ANDERSON V. CHARLES, 447 U.S. 404 (1980), DOYLE V. OHIO, 426 U.S. 610 (1976) DOES NOT APPLY TO THIS CASE. ----------	8
III. THE LOWER COURT CORRECTLY HELD THAT THE PETITIONER'S STATEMENTS AND CONSENT TO SEARCH WERE NOT TAINTED BY AN ILLEGAL ARREST. ----------	9
IV. THE LOWER COURT CORRECTLY HELD THAT THE QUESTIONS ASKED OF PETITIONER BY THE TRIAL COURT WERE PROPER. ----------	10
V. THE COURT SHOULD DENY CERTIORARI AS TO THE ISSUE OF WHETHER AN OVERLAP BETWEEN THE AGGRAVATED ASPECT OF THE CAPITAL OFFENSE AND AN AGGRAVATING CIRCUMSTANCE FOR PURPOSES OF SENTENCE DETERMINATION VIOLATES THE EIGHTH AMENDMENT BECAUSE THE ISSUE IS CLEARLY WITHOUT MERIT. ----------	10
VI. THE COURT SHOULD DENY CERTIORARI AS TO THE ISSUE OF WHETHER THE FACTS SUPPORTED THE FINDING THAT THE CAPITAL OFFENSE WAS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL COMPARED TO OTHER CAPITAL OFFENSES.----------	16

TABLE OF CONTENTS (CONT'D)

PAGE

A. The Court Should Deny Certiorari As To This Issue Because It Is Clearly Without Merit and Therefore Unworthy of Certiorari Review. ------ 16

B. The Court Should Deny Certiorari As To This Issue Because It Involves Relitigation of Questions of Fact Already Decided Below. ------ 18

CONCLUSION---------- 19

CERTIFICATE OF SERVICE---------- 20

TABLE OF AUTHORITIES

PAGE

Anderson v. Charles,
447 U.S. 404 (1980) ---------- 9

Barclay v. Florida,
463 U.S. 939, 947 (1983) (plurality opinion) ---------- 17

Bradley v. State,
494 So.2d at 770 ---------- 17

Bradley v. State,
494 So.2d at 769-770 ---------- 18

Brady v. Maryland,
373 U.S. 83 (1963) ---------- 8

Doyle v. Ohio,
426 U.S. 610 (1976) ---------- 8

Fletcher v. Weir,
455 U.S. 603 (1982) ---------- 9

Grayson v. Harris,
267 U.S. 352, 358 (1925) ---------- 18

Gregg v. Georgia,
428 U.S. 153 (1976) ---------- 12

Jurek v. Texas,
428 U.S. 262 (1976) ---------- 14

Proffitt v. Florida,
428 U.S. 242 (1976) ---------- 12

Proffitt v. Florida,
428 U.S. 242, 255-256 (1976) (plurality opinion) ---------- 17

Sandstrom v. Montana,
442 U.S. 510 (1979) ---------- 11

Schneckloth v. Bustamonte,
412 U.S. 218 (1973) ---------- 9

Taylor v. Alabama,
457 U.S. 687, 690 (1982) ---------- 10

United States v. Agurs,
427 U.S. 97 (1976) ---------- 8

Welcome v. Blackburn,
793 F.2d 672, 677 (5th Cir. 1986) ---------- 14

STATUTES

PAGE

Code of Alabama 1975,

§13A-5-39 ---------- 16

§13A-5-40 ---------- 12

§13A-5-40(a) ---------- 11

§13A-5-40(a)(1) ---------- 12

§13A-5-40(a)(3) ---------- 10

§13A-5-46(e)(3) ---------- 13

§13A-5-49 ---------- 12

§13A-5-49(4) ---------- 12

§13A-5-49(8) ---------- 16

§13A-5-50 ---------- 12

OPINIONS BELOW

1. The opinion of the Alabama Court of Criminal Appeals affirming Petitioner's conviction and death sentence is published as Bradley v. State, 494 So.2d 750 (Ala. Crim. App. 1985).

2. The opinion of the Alabama Supreme Court affirming the Court of Criminal Appeals decision is published as Ex Parte Bradley, 494 So.2d 697 (Ala. 1986).

JURISDICTION

The decision of the Alabama Supreme Court affirming Petitioner's conviction and sentence was issued July 25, 1986, and rehearing was denied on September 12, 1986.

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Petitioner addresses issues involving the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

STATUTORY PROVISIONS INVOLVED

Code of Alabama 1975, § 13A-5-49(4)

Code of Alabama 1975, § 13A-5-40(a)(1)-(4)

Code of Alabama 1975, § 13A-5-50

Code of Alabama 1975, § 13A-5-46(e)(3)

Code of Alabama 1975, § 13A-5-49(8)

STATEMENT OF THE CASE

The facts and circumstances of the commission of the crime, as found by the Alabama Court of Criminal Appeals are:

On the morning of January 25, 1983, the body of twelve-year-old Rhonda Hardin was found in a wooded area in Piedmont, Calhoun County, Alabama. It was determined that she was the victim of a homicide and that the death was asphyxia due to strangulation by the application of external pressure to the neck. Her body bore some evidence of sexual assault and the autopsy indicated the presence of human semen in her vagina, rectum, mouth and gastric content.

(494 So.2d at 754)

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The trial court proceedings were stated as follows by the Alabama Court of Criminal Appeals:

Danny Joe Bradley was indicted for the capital murder of Rhonda Hardin, his twelve-year-old step-daughter. A jury convicted him of two counts of a four-count indictment: murder during a rape in the first degree and murder during a sodomy in the first degree in violation of Alabama Code 1975, § 13A-5-40(a)(3). After a sentence hearing, the jury unaminously recommended the death penalty. Following a presentence investigation, the trial court held a sentence hearing and sentenced Bradley to death by electrocution.

(494 So.2d at 752)

- - - -

The facts surrounding the trial court's denial of the Petitioner's motion for new trial are as follows:

Prior to trial, the Petitioner's attorneys filed a discovery motion asking for all statements made by a Ricky McBrayer. Also prior to trial, the Piedmont Police Department informed Petitioner's counsel that McBrayer had confessed to Rhonda's murder but that the confession had been investigated by the Piedmont Police and Alabama Bureau of Investigation and it had been determined that McBrayer was not involved and that the confession was without grounds and was not true.

After the Petitioner's trial, his attorneys filed a motion for a new trial based on newly discovered evidence which alleged that the State had failed to disclose the name of Glen Burns, the person to whom McBrayer had confessed. The trial court denied this motion and that denial was affirmed by the Alabama Court of Criminal Appeals and the Alabama Supreme Court.

(494 So.2d at 767-768)

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The facts pertinent to the propriety of the comments by the District Attorney in his closing argument to the jury are as follows:

The Petitioner was arrested following his indictment on March 22, 1983, and held without bond in the county jail until his trial on July 11, 1984. The Petitioner was not given Miranda warnings at either the time of his arrest upon the indictment or any time thereafter. By a letter to his wife dated July 4, 1983, the Petitioner admitted that he had left the house the night of Rhonda's disappearance. This was contrary to what the Petitioner had earlier told the Police when he had been questioned in December of 1983. The District Attorney cross-examined the Petitioner about why he never told the

police the whole truth, both before and after his arrest and argued the subject before the jury in closing arguments.

(494 So.2d at 767)

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The facts pertinent to the consent to search form signed by the Petitioner are as follows:

At 3:30 a.m. on January 25, 1983, the Petitioner walked into the Piedmont, Alabama Police Department and stated that he had argued with his step-daughter, Rhonda Hardin, the night before and then fell asleep and upon awakening at 11:30 p.m., discovered that Rhonda was missing. Between 8:30 and 9:30 a.m., Piedmont Police Officers arrived at Petitioner's residence and transported the Petitioner to the police station for questioning. They did not tell him he was under arrest. (494 So.2d at 455-458)

At tne police station, the Petitioner was given his Miranda rights and waived them stating that he had nothing to hide and did not see where he needed counsel. Petitioner stated he wanted to stay until he got this cleared up. Petitioner signed a written "permission to search" after the form was read to him and he was given an opportunity to read the form himself. The form stated as follows: "I am giving this written permission to these officers freely and voluntarily, without any threats or promises having been made, and after having been informed by said officer that I have a right to refuse this search and/or seizure."
(494 So.2d at 756)

The Petitioner voluntarily agreed to go to Birmingham, Alabama, on the afternoon of January 25,

1983, where he was administered different tests. The Petitioner admitted at trial he went to Birmingham voluntarily because he had nothing to hide and was willing to cooperate. Petitioner also went to Piedmont Medical Clinic and willingly gave blood and saliva samples. (494 So.2d at 756-757)

Petitioner was returned to his home at 4:00 a.m. of January 26, 1983, without being charged with this crime or placed under bond. The next day, Petitioner, while at his home, consented to a second search of his home and again signed a written permission to search. Petitioner returned to the police station several more times subsequent to this date.

(494 So.2d at 756-757)

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The facts pertinent to the trial court's questioning of the Petitioner at trial are as follows:

The Petitioner took the stand and testified in his own behalf. It was his testimony that on the night of the murder, he had left the house to steal a car and when he returned, Rhonda was gone. He stated that he had stolen a bicycle from a house and rode it to the location where he was going to steal the car. After Petitioner was questioned by his attorney and the District Attorney, the trial court asked the following questions:

> Q. Tell us exactly where it was that you got this bicycle.
>
> A. It was on Hughes Street.
>
> Q. And whose bicycle was that?
>
> A. It belonged to little Welsh boy, I believe is his name.
>
> Q. All right. And what size bicycle is that?
>
> A. It's a twenty-inch bicycle.

Q. And you rode a twenty-inch wheel bicycle from that point out the highway to Centre?

A. Yes, sir.

Q. I don't believe anybody asked you, why didn't you steal the car?

A. There was people up and about in the house.

Q. Any of those people see you?

A. No, sir, I don't think so. If they would, I believe they would have came out.

Q. Did anybody else see you on the way out there or back?

A. I can't say if they did or not.

Q. But you drove all the way out to this point where you intended to steal the automobile; is that right?

A. Yes, sir.

Q. And people were up?

A. Yes, sir.

Q. All right. And can you tell us--can you describe from your memory what house it was or where you went?

A. I can't depict the exact location, but I know the people that lived there.

Q. What was their name?

A. It would be Jennings.

Q. Jennings?

A. Yes, sir.

Q. Does their house face onto the highway

A. Yes, sir.

Q. And you left it back on Hughes Street?

A. Yes, sir, where I got it.

Q. Back at the Welsh house. And how far is Hughes Street, the Welsh house, from where you live?

A. From where I live?

Q. Uh-huh (affirmative).

A. Maybe two or three blocks.

Q. Well, when you were going then to notify your wife, you wanted to get to her, why didn't you think about--why didn't you use this bicycle to ride to the hospital?

A. I didn't think about the bicycle. I was upset because my step-daughter wasn't at home.

Q. You had ridden all the way out the highway and then back?

A. Yes, sir.

Q. Just three or four--two or three blocks from your house?

A. Yes, sir.

Q. And that you didn't think about it being there?

A. No, sir.

THE COURT: That's all I have.

(494 So.2d at 768-769)

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ARGUMENT

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

The petition for writ of certiorari should be denied because the Alabama appellate courts correctly applied this Court's applicable decisions to each of the issues raised in the petition. All of the issues involve fact-specific matters peculiar to this case which are not of sufficient importance to merit certiorari review by this Court, particularly since they will be reviewed and decided in the 28 U.S.C. § 2254 proceeding which will inevitably follow a denial of certiorari by this Court.

I. THE COURT BELOW CORRECTLY HELD THAT THERE WAS NO VIOLATION UNDER BRADY V. MARYLAND, 373 U.S. 83 (1963).

The Alabama Court of Criminal Appeals correctly decided under Brady v. Maryland, 373 U.S. 83 (1963), that the exculpatory evidence--McBrayer's confession--was in fact disclosed to defense counsel. That this is true is not in dispute. The only issue in dispute involves whether the State was required to divulge the name of the person to whom the confession was made. The lower court correctly held that the ruling of Brady or that of United States v. Agurs, 427 U.S. 97 (1976), requiring the disclosure of certain exculpatory evidence, was not violated because of the State's failure to inform defense counsel of the name of the man to whom McBrayer confessed.

(494 So.2d at 767-768)

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II.(a) THE COURT BELOW CORRECTLY HELD THAT THERE WAS NO VIOLATION OF DOYLE V. OHIO, 426 U.S. 610 (1976) BY THE PROSECUTOR.

II.(b) THE COURT BELOW CORRECTLY HELD THAT PURSUANT TO ANDERSON V. CHARLES, 447 U.S. 404 (1980), DOYLE V. OHIO, 426 U.S. 610 (1976) DOES NOT APPLY TO THIS CASE.

The Alabama Court of Criminal Appeals correctly held that the closing arguments by the District Attorney did not constitute an improper comment on the Petitioner's post-arrest silence in violation of Doyle v. Ohio, 426 U.S. 610 (1976). The Court made a finding of fact that the Petitioner had not been given Miranda warnings after his arrest and thus, the comments were proper under the

holding of Fletcher v. Weir, 455 U.S. 603 (1982), which holds that a prosecutor may impeach a defendant with his post-arrest silence without violating due process when the defendant's post-arrest silence precedes Miranda warnings. The Court also correctly held that Doyle did not apply to the facts of this case since Doyle does not apply to cross-examination that merely inquires into prior inconsistent statements. Anderson v. Charles, 447 U.S. 404 (1980). Here, the Petitioner made two inconsistent statements; the first to the police in his initial report of Rhonda's disappearance and the second in a letter to his wife. Thus, pursuant to Anderson, Doyle has no application to this case.

III. THE LOWER COURT CORRECTLY HELD THAT THE PETITIONER'S STATEMENTS AND CONSENT TO SEARCH WERE NOT TAINTED BY AN ILLEGAL ARREST.

The Alabama Court of Criminal Appeals correctly held that the Petitioner's consent to search was valid. The Court, pursuant to the holding of Schneckloth v. Bustamonte, 412 U.S. 218 (1973), made a determination from the totality of the circumstances that the consent was not the product of duress or coercion and was therefore voluntary under the Fifth Amendment. They correctly found that the Record supports the trial court's finding that "[a]t the police station the Defendant was fully advised of his legal rights and then indicated his desire to cooperate with the legal authority." The Court also made a finding of fact that the evidence supported a finding that in light of the cooperation displayed by the Petitioner at the police station and after his release, and considering that it was Petitioner himself who actually initiated the

investigation by reporting Rhonda's disappearance and soliciting the help of the police in finding her, the Petitioner's consent to search, as well as his statements, were not tainted by the illegal arrest. Taylor v. Alabama, 457 U.S. 687, 690 (1982).

(494 So.2d at 766)

IV. THE LOWER COURT CORRECTLY HELD THAT THE QUESTIONS ASKED OF PETITIONER BY THE TRIAL COURT WERE PROPER.

The Alabama Court of Criminal Appeals made a factual finding that the questions asked by the trial court of the Petitioner did not cast doubt on the Petitioner's credibility. The Court correctly found that by affording the Petitioner the opportunity to fully explain his reasons and his actions on the night of Rhonda's disappearance, the trial court allowed him to bolster and shore up his testimony giving previously unrelated facts and details which lent Petitioner's account some semblance of truth.

(494 So.2d at 768-769)

V. THE COURT SHOULD DENY CERTIORARI AS TO THE ISSUE OF WHETHER AN OVERLAP BETWEEN THE AGGRAVATED ASPECT OF THE CAPITAL OFFENSE AND AN AGGRAVATING CIRCUMSTANCE FOR PURPOSES OF SENTENCE DETERMINATION VIOLATES THE EIGHTH AMENDMENT BECAUSE THE ISSUE IS CLEARLY WITHOUT MERIT.

The defendant was convicted of the capital offense of murder during a rape in the first degree under Code of Alabama 1975, §13A-5-40(a)(3).[1] In the subsequent

[1]The defendant was also convicted of the separate capital offense of murder during a sodomy in the first degree arising from the same incident.

sentence hearing the jury was allowed to consider as a statutory aggravating circumstance that the offense was committed while the defendant was engaged in a rape. Under his argument V the defendant contends that this involved two constitutional violations. First, he argues that allowing the State to use as an aggravating circumstance an element of the offense is contrary to the Eighth Amendment in that it relieves the State of the burden of proving that the death penalty is warranted. Second, the defendant argues that this procedure violates due process under Sandstrom v. Montana, 442 U.S. 510 (1979), because it allows the shifting of the burden of proof to the defendant. Both of these arguments are without merit.

Under Alabama's present capital murder statute several of the types of intentional murder designated capital offenses involve murder during the course of, respectively, kidnapping, robbery, rape, and burglary.[2] The aggravating circumstances that may be considered in

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[2]Code of Alabama 1975, §13A-5-40(a), provides in pertinent part as follows:

> (a) The following are capital offenses:
>
> (1) Murder by the defendant during a kidnapping in the first degree or an attempt thereof committed by the defendant;
>
> (2) Murder by the defendant during a robbery in the first degree or an attempt thereof committed by the defendant;
>
> (3) Murder by the defendant during a rape in the first or second degree or an attempt thereof committed by the defendant;
>
> (4) Murder by the defendant during a burglary in the first or second degree or an attempt thereof committed by the defendant;

determining the sentence for a capital offense are provided under Code of Alabama 1975, §13A-5-49. Among these statutory aggravating circumstances is the following provided under §13A-5-49(4):

> (4) The capital offense was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit, rape, robbery, burglary or kidnapping; ...

There is, therefore, an overlap between the aggravating aspect of certain capital offenses (the element that must exist in addition to an intentional murder in order for there to be a capital offense) and an aggravating circumstance for purposes of sentence determination. In the case of a person convicted under §13A-5-40(a)(1) through (4)--in other words, murder during a kidnapping; murder during a robbery; murder during a rape; or murder during a burglary--the aggravating aspect of the offense will establish an aggravating circumstance under §13A-5-49(4). This relationship between the aggravating aspect of these offenses and the aggravating circumstances for sentence determination is recognized in Code of Alabama 1975, §13A-5-50, which provides as follows:

> The fact that a particular capital offense as defined in section 13A-5-40(a) necessarily includes one or more aggravating circumstances as specified in section 13A-5-49 shall not be construed to preclude the finding and consideration of that relevant circumstance or circumstances in determining sentence. By way of illustration and not limitation, the aggravating circumstance specified in section 13A-5-49(4) shall be found and considered in determining sentence in every case in which a defendant is convicted of the capital offenses defined in subdivisions (1) through (4) of subsection (a) of section 13A-5-40.

This sentencing scheme does not violate the Eighth Amendment. In Gregg v. Georgia, 428 U.S. 153 (1976), and Proffitt v. Florida, 428 U.S. 242 (1976), the Court

rejected Eighth Amendment challenges to the Georgia and Florida capital murder statutes. In both of these cases the basic offense for which the defendant was sentenced to death was murder. 428 U.S. at 162 n. 4; 428 U.S. at 248 n. 4. Under the Georgia statute the sentencing authority must find the existence of at least one of ten statutory aggravating circumstances before it can then proceed to determine whether the death penalty should be imposed. 428 U.S. at 196-197. In the case of the Florida statute the sentencing authority must decide whether the statutory aggravating circumstances outweigh the mitigating circumstances, 428 U.S. at 247-250; if no statutory aggravating circumstance exists a defendant cannot be sentenced to death. See, 428 U.S. at 255. With regard to both of these statutes, therefore, the finding of a statutory aggravating circumstance is necessary in order for a defendant to be within the category of murderers who may be sentenced to death. The Court held that these procedures, which narrow the category of crimes for which death can be imposed, are sufficient to distinguish in a meaningful way the few cases in which death is imposed from the many cases in which it is not. 428 U.S. at 198; 428 U.S. at 253.

Alabama's present capital murder statute operates in much the same way as Florida's and Georgia's. Under Alabama law a death sentence is imposed only where the statutory aggravating circumstances outweigh all mitigating circumstances, and a finding of at least one statutory aggravating circumstance is necessary in order for a defendant to fall within the category of defendants who may be sentenced to death. Code of Alabama 1975, §13A-5-46(e)(3). Thus, as with the Florida and Georgia statutes the existence of a statutory aggravating

circumstance separates those murderers who may be sentenced to death from those who may not, and the determination of whether death will actually be the sentence in a given case depends on whether aggravation outweighs mitigation. The only differences in the statutes in this regard is that, in cases under the Alabama statute involving intentional murder during the course of certain felonies, proof of an aggravating circumstance is presented at trial and the aggravating circumstance is in effect established by the verdict. In other words, the determination of whether the aggravating circumstance exists is made at the guilt stage rather than the sentence stage.

The defendant presents no argument as to how the determination of the existence of an aggravating circumstance at one stage of the proceeding rather than another is unconstitutional. On the contrary, Alabama's capital murder scheme is in this regard similar to that of Texas which was upheld by the Court in Jurek v. Texas, 428 U.S. 262 (1976). Under Texas law capital murder is defined as intentional murder committed under certain circumstances, including murder during certain felonies. 428 U.S. at 268, 273. In Jurek the Court recognized that the State of Texas, by so defining its capital offenses, in effect narrowed the category of murder for which the death penalty could be imposed, and that this inclusion of aggravation in the charged offense thus served the same purpose as the list of statutory aggravating circumstances under Florida and Georgia law. 428 U.S. at 270. For precisely this reason a similar argument regarding Louisiana's capital murder statute has been rejected by the Fifth Circuit. Welcome v. Blackburn, 793 F.2d 672, 677 (5th Cir. 1986).

The petitioner's argument that the State is relieved of its burden is simply incorrect. The State must establish that a defendant is eligible for the death penalty by proving an aggravating circumstance. Whether this occurs at the guilt stage or the penalty stage is irrelevant; the burden is still on the State, and the defendant still has the opportunity to refute the State's evidence. Moreover, in order for the defendant to be sentenced to death, the statutory aggravating circumstances must outweigh all mitigating circumstances. Therefore, no burden has been shifted to the defendant.

The petitioner's argument must fail because in his case the practical effect of placing an aggravating circumstance within the definition of the charged crime was the same as not doing so. Suppose Alabma had, like Florida, defined the capital offense simply as intentional murder, and had determined that the fact that the murder took place during a rape was an aggravating circumstance for purposes of sentence determination. In the trial of the petitioner's case the evidence of the accompanying rape would have been admitted as being within the res gestae of the murder. Because the evidence of the rape in the petitioner's case was sufficient to prove the rape beyond a reasonable doubt, this evidence would undoubtedly have been strong enough to establish the aggravating circumstance; the only difference would have been a technical one--that it was not established by the verdict itself. If, on the other hand, the evidence had not been sufficient to prove the rape beyond a reasonable doubt, the petitioner would have been distinctly worse off than under present Alabama law, because he would still have been guilty of a capital offense and could have been sentenced to death if another aggravating circumstance were found, whereas under

present Alabama law he would have been acquitted of the capital offense and could not have been sentenced to death.

The defendant also argues that the procedure in question violates Sandstrom v. Montana, 442 U.S. 510 (1979). This contention is also meritless. Sandstrom held that a shifting of the burden of proof to the defendant before the jury made its factual determination violated due process. By contrast, the Alabama capital murder statute, the State must prove the existence of at least one aggravating circumstance for the defendant to be eligible for the death penalty; the State shoulders this burden in the case of murders during certain felonies by proving the defendant guilty beyond a reasonable doubt of the charged charge. It is only after the State has proven the aggravating circumstance by convicting the defendant that the defendant need show any mitigating circumstances in order to avoid a death sentence.

For the above reasons the arguments raised by the defendant are meritless and not worthy of certiorari, and the Court should deny certiorari as to this issue.

VI. THE COURT SHOULD DENY CERTIORARI AS TO THE ISSUE OF WHETHER THE FACTS SUPPORTED THE FINDING THAT THE CAPITAL OFFENSE WAS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL COMPARED TO OTHER CAPITAL OFFENSES.

A. The Court Should Deny Certiorari As To This Issue Because It Is Clearly Without Merit and Therefore Unworthy of Certiorari Review.

Under Alabama's present capital murder statute, Code of Alabama 1975, §13A-5-39, et seq., one of the statutory aggravating circumstances which may be found is that the capital offense was especially heinous, atrocious, or cruel compared to other capital offenses. Code of Alabama 1975, §13A-5-49(8). The trial court below, in sentencing the petitioner to death, found that this aggravating

circumstance existed in this case. Bradley v. State, 494 So.2d at 770. The petitioner contends, under his issue VI, that the facts do not support the trial court's findings.

This issue is clearly without merit for certiorari review. In considering the question of whether certain facts make out a particular statutory aggravating circumstance under state law, federal review is limited to the question of whether the state court findings are so unprincipled or arbitrary as to somehow violate the Constitution. Barclay v. Florida, 463 U.S. 939, 947 (1983) (plurality opinion). The decision below was in no way unprincipled or arbitrary. The Alabama Court of Criminal Appeals held that this aggravating circumstance applied in this case--the rape, sodomy, and murder of a twelve-year-old girl--on two different grounds. First, the Court of Criminal Appeals determined based on the Georgia Supreme Court's construction of a similar aggravating circumstance that this aggravating circumstance applies where there is sexual abuse prior to death. 494 So.2d at 770. Second, the Court of Criminal Appeals found that the case was very similar factually to a Florida rape/murder of a twelve-year-old girl in which the Florida Supreme Court held that the same aggravating circumstance was applicable. Id. This Court has previously noted with approval the limitations placed on this aggravating circumstance by the Florida Supreme Court. Proffitt v. Florida, 428 U.S. 242, 255-256 (1976) (plurality opinion).

Because the application of this aggravating circumstance to the facts of this case were reasonable and consistent with the decisions of other state courts, the decision in this case was certainly not unprincipled or arbitrary. The issue raised by the petitioner is, therefore, meritless on its face, and the Court should deny certiorari as to this issue.

B. The Court Should Deny Certiorari As To This Issue Because It Involves Relitigation of Questions of Fact Already Decided Below.

In arguing that the facts in this case do not support a finding of an aggravating circumstance the petitioner claims that "the facts are as consistent with an accidental strangulation during voluntary sex as they were with a deliberate strangulation during forcible sex." (petitioner's brief, p. 26). The jury, however, found the petitioner guilty of intentional murder during a rape by forcible compulsion and intentional murder during a sodomy by forcible compulsion. Bradley v. State, 494 So.2d at 769-770. The issue as presented by the petitioner thus involves a relitigation of the facts as established below and, in essence, an attack on the jury's verdict.

This Court does not generally sit to re-examine findings of fact. Grayson v. Harris, 267 U.S. 352, 358 (1925). This rule is especially applicable where the State's case is based primarily on extensive circumstantial evidence. Bradley v. State, 494 So.2d at 769-770. Because the petitioner's argument regarding the existence of this particular aggravating circumstance turns on a re-evaluation of the facts the Court should deny certiorari as to this issue.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

CHARLES A. GRADDICK
ALABAMA ATTORNEY GENERAL

WILLIAM D. LITTLE
ASSISTANT ALABAMA ATTORNEY GENERAL

MARTHA GAIL INGRAM
ASSISTANT ALABAMA ATTORNEY GENERAL

CERTIFICATE OF SERVICE

I, Martha Gail Ingram, a member of the Bar of the Supreme Court of the United States, do hereby certify that I did serve a copy of the foregoing Brief and Argument on petitioner by placing three copies in the United States mail, first class postage prepaid, and properly addressed to his counsel of record as follows:

Hon. Alan Polsky
Attorney at Law
368 Veteran's Memorial Highway
Commack, New York 11725

This 14th day of January, 1987.

Martha Gail Ingram

MARTHA GAIL INGRAM
ASSISTANT ALABAMA ATTORNEY GENERAL